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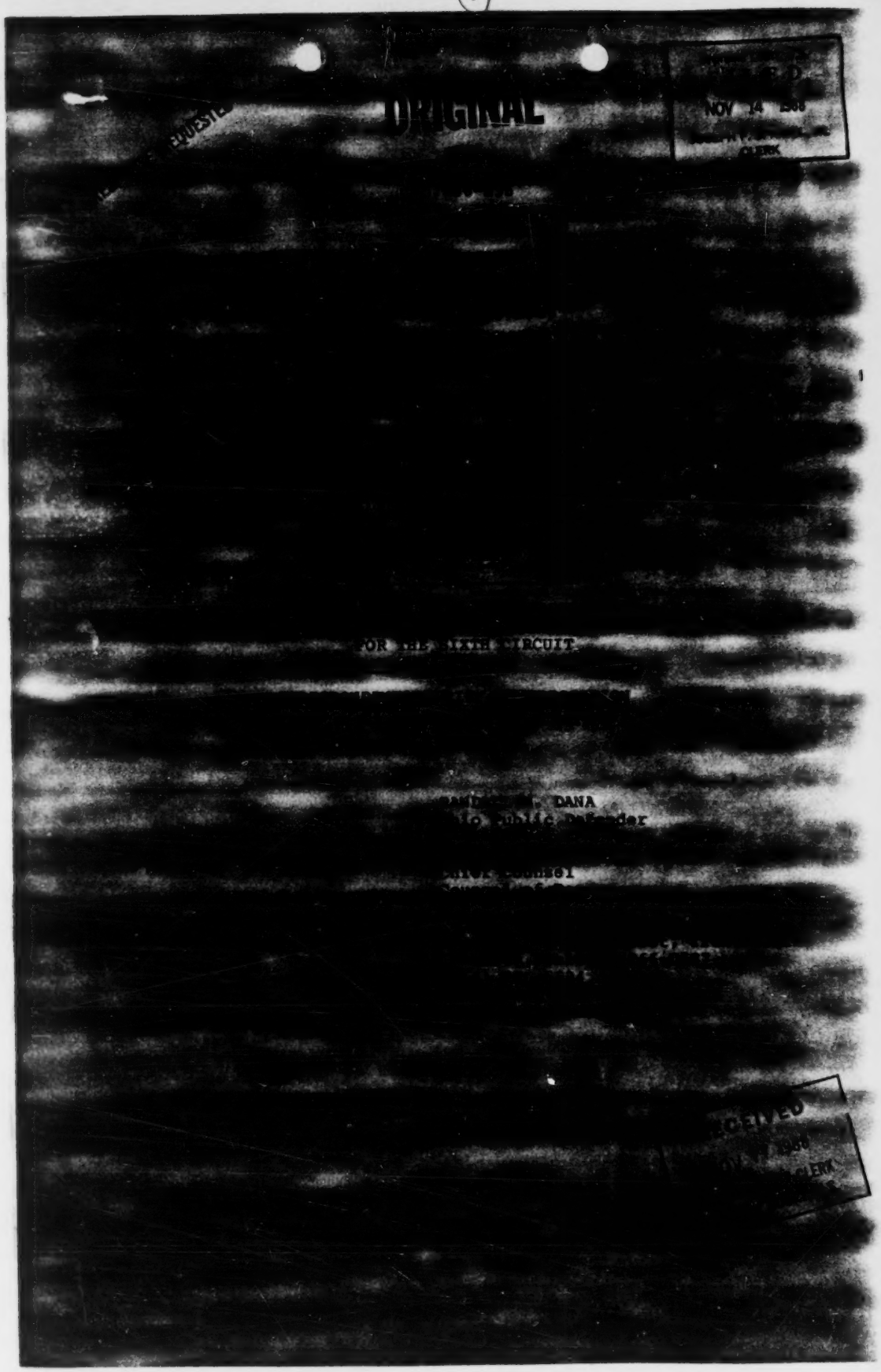

## QUESTION PRESENTED

I. WHETHER PREJUDICE IS TO BE PRESUMED UNDER STRICKLAND v. WASHINGTON, 446 U.S. 668 (1984), AND UNITED STATES v. CRONIC, 466 U.S. 648 (1984), STANDARDS FOR INEFFECTIVE ASSISTANCE OF COUNSEL WHEN APPELLATE COUNSEL CONCLUDES THE APPEAL LACKS MERIT BUT FAILS TO COMPLY WITH THE PROCEDURES REQUIRED BY ANDERS v. CALIFORNIA, 386 U.S. 738 (1967).

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No. 88-336

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**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 1988

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NORM F. HILLS, SUPT.,

Petitioner,

v.

ALBERT HUSTON FREELS,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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RESPONDENT'S BRIEF IN OPPOSITION

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The respondent, Albert Huston Freels, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 843 F. 2d 958 (6th Cir. 1988).

**STATEMENT OF THE CASE**

Respondent Freels (hereafter Freels) accepts petitioner's Statement of the Case subject to the following correction and addition. Petitioner states with respect to Freels' no contest plea hearing that the state trial judge asked Freels "if he understood the charge of felonious assault." Petition for Certiorari (hereafter Pet. for Cert.) 4. That is inaccurate. The court asked Freels if he understood that he had been indicted on the charge of felonious assault. [Trial Transcript (hereafter Tr.) 2]. In addition, the circuit court below found that the trial court "failed specifically to discuss the elements of

felonious assault with [Freels] as required by ... [Ohio Criminal] Rule [11(C)(2)(a)]." Pet for Cert. A-8.

## PRELIMINARY STATEMENT

### The Issue Presented By This Case Is Presently Before The Court In Penson v. Ohio, Case No. 87-6116.

This Court granted certiorari in **Penson v. Ohio**, No. 87-6116, on February 22, 1988. ___ U.S. ___, 98 L. Ed. 2d 977 (1988).[1] One of the issues before the Court in **Penson** is whether prejudice must be shown when counsel improperly withdraws from an appeal without filing a brief, after concluding the appeal is without merit. Thus, to the extent the issue presented herein is decided by this Court in **Penson**, a grant of certiorari for plenary review in this case is unnecessary to its resolution. The decision to grant or deny certiorari in this case should therefore be consistent with this Court's decision in **Penson**. In the event that the Court does not adjudicate the issue presented by this case, Freels submits this Court should deny certiorari for the following reasons.

## REASONS FOR DENYING THE PETITION

### 1. The Court Below Correctly Decided That Prejudice Must Be Presumed When Appellate Counsel Fails To Substantially Comply With The Anders v. California, 386 U.S. 738 (1967), Procedures.

The Sixth Circuit's decision that prejudice is to be presumed when counsel fails to comply with the **Anders v. California**, 386 U.S. 738 (1967), procedures is consistent with the precedents of this Court. **Strickland v. Washington**, 466 U.S. 668, 692 (1984), and **United States v. Cronic**, 466 U.S. 648, 656-57, 659 (1984), expressly recognize that prejudice is to be

---

[1] The **Penson** case was orally argued on October 12, 1988, and is currently awaiting decision by this Court.

presumed when counsel is either denied or fails to meaningfully participate in the adversary process as an advocate. "[These] circumstances are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." **Strickland**, 466 U.S. at 692; **Cronic**, 466 U.S. at 659. That, of course, is what petitioner asks this Court to do in this case.

Petitioner does not contest the fact that Freels' counsel did not participate in the appellate adversary process as an advocate. As the Sixth Circuit recognized,

> As close as counsel's brief comes to advocacy is the unsupported representation that "upon careful review of the docket and transcript, [he] concludes that the trial court committed no error prejudicial to the defendant." In short, we are wholly unable to find that court-appointed counsel for Freels did more than or indeed even as much as was done by court-appointed counsel in **Anders**.

Pet. for Cert. A-14. For all practical purposes, Freels was effectively without counsel on appeal. Under **Strickland** and **Cronic** principles, prejudice is presumed.

Moreover, this Court has consistently required a new appeal without a showing of prejudice when the right to counsel has been denied, **Douglas v. California**, 372 U.S. 353 (1963), **Swenson v. Bosler**, 386 U.S. 258 (1967), or appellate counsel has failed to provide adequate or effective legal assistance, **Anders**, 386 U.S. at 738, **Evitts v. Lucey**, 469 U.S. 387 (1985). This is because the right to counsel is one of the "minimum safeguards" necessary to assure an adequate and effective appeal for indigent defendants. **Evitts**, 469 U.S. at 392.

Petitioner correctly recognizes that this Court in **Evitts** did not set specific standards for evaluating claims of ineffective assistance of appellate counsel. However, as the circuit court pointed out, this Court did indicate that appellate counsel

> "...must be available to assist in preparing and submitting a brief to the appellate

> court...and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim. **See Anders v. California**, 386 U.S. 738 (1967); **see also Entsminger v. Iowa**, 386 U.S. 748 (1967)."

**Id.** at 393-94. Counsel's failure to meet these minimum requirements essentially waives the defendant's opportunity to make a case on the merits and is the equivalent of having no counsel. **Id.** at n. 6. Contrary to petitioner's assertion, see Pet. for Cert. 11, the **Evitts** Court, **id.** at 396-97, did recognize that **Anders** sets the minimum constitutional requirements for effective assistance on appeal:

> A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney. This result is hardly novel. The petitioners in both **Anders v. California**, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967), and **Entsminger v. Iowa**, 386 U.S. 748, 18 L. Ed. 2d 501, 87 S. Ct. 1402 (1967), claimed that, although represented in name by counsel, they had not received the type of assistance constitutionally required to render the appellate proceedings fair. In both cases, we agreed with the petitioners holding that **counsel's failure in Anders to submit a brief on appeal** and counsel's waiver in **Entsminger** of the petitioner's right to a full transcript **rendered the subsequent judgments against the petitioner unconstitutional.** (Emphasis added).

This Court's recent decision in **McCoy v. Court of Appeals of Wisconsin, District I**, ___ U.S. ___, 100 L. Ed. 2d 440 (1988), reaffirmed **Anders** requirements. The Court stated in **McCoy** that when appellate counsel represents the appeal is frivolous and seeks to withdraw, the court must make two determinations to satisfy federal constitutional concerns:

> "First, it must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. Second, it must determine whether counsel has correctly concluded the appeal is frivolous."

**Id.** at 455. This Court found that these critical determinations cannot be made on the mere statement by counsel that the appeal

is frivolous. **Id.** at 454. Thus, **McCoy** reaffirmed **Anders'** requirement that counsel's motion to withdraw be accompanied by "a brief referring to anything in the record that might arguably support the appeal. **Id.** That requirement was not met here.

Petitioner, on the other hand, suggests that **Anders'** well-established procedures, designed to protect the right to counsel, see **Pennsylvania v. Finley**, 481 U.S. ___, 95 L. Ed. 2d 539 (1987), can be overlooked where the record is "devoid of error." Petitioner's suggestion is unwise and constitutionally unsound. Whether the record is "devoid of error" is a determination that this Court has found cannot be reliably made without counsel's participation as an advocate and compliance with the **Anders** procedures. **Anders**, 386 U.S. at 745; **McCoy**, 100 L. Ed. 2d at 454. As the circuit court found:

> "...we believe that the absence of any evidence of advocacy in the role of appellate counsel presumptively places such a conclusion in serious doubt and vindicates the wisdom of **Anders**."

Pet. for Cert. A-17. If counsel's noncompliance with **Anders** can be deemed nonprejudicial, it would, as the lower court noted, see Pet. for Cert. A-18, "effectively eras[e] **Anders** from the books altogether." Assuming that the appellate courts will routinely enforce the **Anders** procedures, as petitioner contends, is simply naive. The circuit court recognized that **Freels'** case was not unique and that the **Anders** requirements are often ignored. Pet. for Cert. A-16.[2] Unless compliance with **Anders** is required, the right to counsel cannot be protected. **See Finley**, 95 L. Ed. 2d at 539.

In addition, a prejudice test would require courts reviewing claims of ineffective assistance of counsel to make subsequent

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[2] For a more complete description of the Ohio appellate courts failure to require compliance with the **Anders** procedures, see Brief for Petitioner 42 n. 11 in **Penson v. Ohio**, No. 87-6116, **cert. granted**, ___ U.S. ___, 98 L. Ed. 2d 977 (February 22, 1988) and the **Amicus Curiae** Brief of the Ohio Association of Criminal Defense Lawyers In Support of Petitioner.

determinations as to whether the defendant was prejudiced by the denial of counsel. Such a rule would require the unnecessary expenditure of judicial resources to a situation where prejudice is "so likely." **Strickland**, 466 U.S. at 692. On the other hand, requiring a presumption of prejudice when counsel is effectively denied is an easy rule for the courts to follow. The violation is easy to identify and easy for the appellate court to prevent. **See Strickland**, 466 U.S. at 692. Finally, it accords the proper respect for the fundamental right to counsel which is essential to an adequate and effective appeal. **Evitts**, 469 U.S. at 392.

**2. Respondent Freels Was Prejudiced By His Appellate Counsel's Failure To Raise On Appeal The Trial Court's Noncompliance With Ohio Criminal Rule 11(C)(2)(a).**

Petitioner contends that "the circuit court did not find any error in the trial court's plea-taking procedures. Pet. for Cert. 13. That is inaccurate. The circuit court did not address this issue. The court made it clear that the only issue it considered was appellate counsel's failure to comply with the **Anders** procedures on appeal. Pet. for Cert. A-13. Indeed, the circuit court's only mention of the issue supports Freels' contention that Ohio Criminal Rule 11(C)(2)(a) was violated:

> "The record shows that while the trial judge did cover most of the requirements with Freels, he failed specifically to discuss the elements of felonious assault with defendant as required by the rule."

Pet. for Cert. A-8.

Moreover, there was a reasonable probability of success on appeal had counsel raised the issue of the trial court's noncompliance with Criminal Rule 11(C)(2)(a). Ohio Criminal Rule 11(C)(2)(a) requires that the trial court address the accused and determine that he is making the guilty or no-contest plea with an understanding of the nature of the charge. This understanding is constitutionally required. **Henderson v. Morgan**, 426 U.S. 637 (1976); **State v. Carter** (1970), 60 Ohio St. 2d 34, 37-38. Ohio

law further requires that the trial court record **affirmatively demonstrate** that the accused understood the nature of the charge. **State v. Billups** (1979), 57 Ohio St. 2d 31; **State v. Hawk** (1977), 55 Ohio App. 2d 231; **City of Garfield Heights v. Brewer** (1984), 17 Ohio App. 3d 216.

In this case, the trial court record does not demonstrate that Freels understood the nature of the charge. (Tr. 2-6). As indicated by the circuit court, the trial court did not discuss the nature or elements of the charge of felonious assault with Freels or inquire as to his understanding of the nature of the charge. Freels was only asked whether he understood that he was pleading no contest to felonious assault. (Tr. 2). No meaningful dialogue between the court and Freels occurred. **See State v. Wilson** (1978), 55 Ohio App. 2d 64, 65. (Meaningful dialogue with defendant required for compliance with Criminal Rule 11(C)(2) requirement that accused understand maximum penalties). Thus, the district court's finding, see District Court Order, attached in Appendix at A-1, that "the trial judge carefully questioned [Freels] about his understanding of the charge," was clearly erroneous.

The District Court further found that Freels signed a written plea agreement which stated that he was making the plea voluntarily and with an understanding of the nature of the charge. Appendix at A-2. However, Ohio courts do not presume compliance with Rule 11 from a written record. **Brewer**, 17 Ohio App. 3d at 217 (meaningful dialogue between court and defendant required; written statements will not satisfy requirements); **Wilson**, 55 Ohio App. 2d 64 (court is not in compliance with Criminal Rule 11(C)(2) when it fails to inform the defendant in oral dialogue of the maximum penalties of the offense to which he pleads guilty, even though the defendant signs a written plea of guilty); **State v. Misch** (June 27, 1984), Hamilton App. No. C830848, unreported, attached in Appendix at A-16 (defendant's

signature on a plea form is not sufficient for a waiver of defendant's rights); **State v. Hall** (January 27, 1981), Montgomery App. No. 6770, unreported, attached in Appendix at A-4 (advising accused of name of charge is not tantamount to explaining to him the nature of the charge; court will not presume from a silent record that the trial court has complied with Rule 11). Thus, there was a reasonable probability of success on appeal if this issue had been raised.

Furthermore, Freels' **pro se** brief in the Ohio Court of Appeals demonstrates that he did not understand the nature of the charge of felonious assault, Ohio Revised Code § 2903.11(A)(2), to which he entered a no contest plea. Ohio Revised Code § 2903.11 provides:

> (A) No person shall knowingly:
>
> (1) cause serious physical harm to another;
> (2) cause or attempt to cause physical harm to another my means of a deadly weapon or dangerous ordinance, as defined in Section 2935.01 of the Revised Code.

In Freels' **pro se** brief he asserted in Assignment of Error Number Three that the state failed to show that he caused serious physical harm to the victim, as required by Section 2903.11(A)(1). However, Freels was not charged under the (A)(1) section of the statute, but the (A)(2) section. Freels' statement in his **pro se** brief established that he did not really understand the essential nature of the charge to which he plead no contest.

Accordingly, Freels had a reasonable chance of success had counsel raised a violation of Ohio Criminal Rule 11(C)(2)(a) on appeal.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

## CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that a copy of the foregoing Respondent's Brief In Opposition was served on Petitioner Norm F. Hills, Supt., by forwarding a copy to the office of his counsel, Rita S. Eppler, Federal Litigation Chief, Ohio Attorney General's Office, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43266-0587 by U.S. mail this 14th day of November, 1988. I further certify that all parites required to be served have been served.

GREGORY L. AYERS
Counsel for Respondent

No. 88-336

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**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 1988

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NORM F. HILLS, SUPT.,

Petitioner,

v.

ALBERT HUSTON FREELS,

Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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**APPENDIX**

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JUDGE ____
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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SOUTHERN DIST. OHIO
EAST'N DIV. COLUMBUS

ALBERT HUSTON FREELS

Petitioner

vs. Civil Action C-2-86-0279

ARTHUR TATE, Supt.

Respondent

ORDER

Petitioner Freels' August 7, 1986 motion to alter or amend judgment is DENIED.

When he entered his plea of no contest, the trial judge carefully questioned petitioner about his understanding of the charge and the rights he was giving up. Petitioner said that he understood what rights he was giving up and voluntarily made his decision to plead after carefully considering the advice of his counsel. The trial judge also told petitioner the maximum penalties and advised him of the effects of a plea of no contest.

The only arguable ground for an appeal petitioner advances is that the trial judge did not comply with Ohio Criminal Rule 11(c)(2)(a) which provides that the trial judge must:

> Determin[e] that he is making the plea voluntarily, with understanding of the nature of

> the charge and of the maximum penalty involved. ...

However, prior to the plea petitioner signed a written plea agreement which specifically advised him of the charge and the maximum penalties. The written plea also states that petitioner was making the plea voluntarily and with an understanding of the nature of the charge. Petitioner's attorney also signed the written plea. In open Court, petitioner acknowledged his written plea, and said he had read it and discussed it with his attorney before he signed it. He further stated that he understood all the rights the written plea agreement said he had, and that he understood what rights the written plea agreement said he was giving up. Petitioner's attorney also stated in open court that petitioner was intelligently and understandingly entering his plea. Thus, petitioner had no arguable claim to set aside his plea of no contest.

United States District Judge

## OHIO REVISED CODE

**§ 2903.11. Felonious assault.**

(A) No person shall knowingly:

(1) Cause serious physical harm to another;

(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code.

(B) Whoever violates this section is guilty of felonious assault, an aggravated felony of the second degree. If the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, felonious assault is an aggravated felony of the first degree.

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

vs. : CASE NO. 6770

JAMES HALL, JR. :

Defendant-Appellant :

3d District

.....

O P I N I O N

Rendered on the 27th day of January, 1981

.....

LEE C. FALKE, Prosecuting Attorney for Montgomery County, Ohio, BY: GARY W. CRIM, Assistant Prosecuting Attorney, Suite 300, 41 North Perry Street, Dayton, Ohio 45402
Attorney for Plaintiff-Appellee

DOUGLAS R. SHAEFFER, Attorney at Law, 1406 Hulman Building, Dayton, Ohio 45402
Attorney for Defendant-Appellant

.....

ZIEGEL, P.J. (By Assignment)

Defendant was indicted for two counts of aggravated robbery (with deadly weapon) and one count of probationable aggravated burglary. After plea bargaining, with the consent of the court, the prosecution nolled the first count of the indictment (aggravated robbery with deadly weapon) and struck the deadly weapon specification from the second count, thus making that charge probationable. The Defendant then entered a plea of no contest to the charges of probationable aggravated robbery and probationable aggravated burglary. After receiving a pre-sentence investigation report, the trial court sentenced the Defendant to serve a term of not less

than four years nor more than twenty-five years on the charge of aggravated robbery and a term of not less than seven years nor more than twenty-five years on the charge of aggravated burglary, said sentences to be served consecutively. In due time, Defendant appealed this sentencing.

Subsequently, Defendant moved for shock probation, which was denied without hearing, and thereafter Defendant was granted leave to join his appeal from the overruling of his motion for shock probation to the basic appeal from the sentence he received.

For his first assignment of error Defendant claims that:

> "The court erred by accepting the Defendant's pleas of no contest...without first addressing the Defendant personally and determining that the Defendant was making the pleas voluntarily, knowingly, and intelligently, with the understanding of the nature of these charges and the consequences and effect of his pleas upon findings of guilty and that he was not eligible for probation, all contrary to Crim. R. 11(C)(2)(a) & (b)..."

The requirements of the Ohio Rules of Criminal Procedure concerning pleas of no contest are set forth in Rule 11(C)(2):

> "(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:
>
> (a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.
>
> (b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.

> (c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself."

Defendant admits that the trial court complied fully with Crim. R. 11(C)(2)(c), but contends that it failed to comply with Crim. R. 11(C)(2)(a) & (b), first, by failing to address the Defendant personally and determining that the defendant understood the nature of the charge of aggravated robbery and the nature of the charge of aggravated burglary.

The arraignment took place on January 18, 1980, and we have before us the transcribed record of that proceedings, consisting of 16½ pages. The record establishes that the Defendant was present during the entire proceedings. At the beginning the assistant prosecuting attorney introducing the case advised the court that Defendant had been indicted for aggravated robbery and aggravated burglary, and Defendant's counsel joined in the introductory remarks with reference to preliminary plea bargaining. It is clear, therefore, that Defendant knew that he was charged with aggravated robbery and aggravated burglary.

Further on in the record reference is made to these charges, first when the Waiver and Plea form was given to Defendant to sign (R-6):

BY THE COURT

Q Now, I want you to read it and explain it to the Court as you go along.

A "I have been advised by the Court --

THE COURT: You can help him.

THE DEFENDANT: "By the Court that I am pleading no contest to the offense of aggravated robbery, two counts --

Mr. Shaeffer: Count Two.

THE DEFENDANT: "Count Two, delete handgun, and aggravated burglary and that the maximum penalty which may be imposed is confinement in a penal institution for a term of 50 years or a fine of $25,000 --

MR. SCHAEFFER: And a fine of $20,000. Do you understand the word confinement, James?

THE DEFENDANT: Right.

At R-7a, Defendant's counsel questioned him:

MR. SCHAEFFER: In effect, if the Judge were to find you guilty, having tendered a plea of no contest, it would be four, five, six, or seven years as a minimum term to 25 years as a maximum term on the aggravated robbery, to be served concurrently with four, five, six, or seven years as a minimum term and 25 years maximum term on the aggravated burglary charge.

THE DEFENDANT: Right.

At R-8, the court was continuing the questioning:

Q In accordance with plea negotiations, by dropping a handgun with respect to one count of robbery, the Court will consider you for probation. But, you understand, do you not, that probation is kind of a touch and go situation where you have got several offenses?

A Right.

At R-9 Defendant's counsel was again involved in the questioning:

MR. SCHAEFFER: Your Honor, may I ask one other question,

THE COURT: Yes. Go ahead.

MR. SCHAEFFER: James, we discussed by tendering a plea of no contest, in the event the Judge were to find you guilty of the aggravated robbery charge as amended and the aggravated burglary charge that he could consider, one, probation; two, probation with a condition of six months in the workhouse.

THE COURT: That is called a split sentence.

At R-12, with the Defendant still reading from the Waiver Form, the following transpired:

A "Face those who accuse me of this crime."

Q Somebody had you arrested for these robbery charges, and you have a right to see those people in open court and subject them to the cross examination of your lawyer, if we try the case.

MR. SCHAEFFER: Your Honor, if it please the Court. Do you know the name of the sole complaining witness in the aggravated robbery case, having discussed his name with me during the course of our discussions?

THE DEFENDANT: Yes.

MR. SCHAEFFER: What is his name?

THE DEFENDANT: Beam.

MR. SCHAEFFER: Do you know the name of the chief complaining witness in the aggravated burglary charge as a result of discussing the same with me?

THE DEFENDANT: Yes, Sammons.

The foregoing excerpts from the record comprise all of the references made to aggravated robbery and aggravated burglary during the proceedings wherein Defendant entered his no contest plea. At the close, the trial judge gave the following summary:

THE COURT: It appears to the Court that the Defendant has signed his change of plea in the presence of his attorney, the prosecuting attorney and the Court. It appears to the Court that he seems to have full and complete understanding of the nature of this plea, that is, the no contest plea, and that the Court may find him either guilty or not guilty; and in the event the Court should

> find him guilty based upon the evidence that is presented by the State, then he understands the maximum penalties provided by law; the difference between consecutive and concurrent terms; his eligibility for consideration for probation; he understands the meaning of aggravated robbery and aggravated burglary; and the fact that a gun has been deleted from the second count of the aggravated robbery charge...

While the trial court specifically found that the Defendant "understands the meaning of aggravated robbery and aggravated burglary," the question still remains as to whether the record demonstrates that understanding. It will not be presumed from a silent record that the trial court has complied with Rule requirements. An appellant meets his burden of demonstrating error by ordering a transcript of the proceedings which do not contain an explanation of his rights. State v. Boerst, 45 Ohio App. 2d 240, 74 Ohio Opns 2d 350, 343 N.E. 2d 853 (1975).

In Henderson v. Morgan, 426 U.S. 637, 49 L. Ed. 2d 108 (1976), the defendant pleaded guilty upon advise of counsel to a charge of second degree murder and was convicted upon that charge. After exhausting his state remedies he brought habeas corpus in the Federal District Court, alleging that his plea was not voluntary because he was not aware that intent to cause death was an element of the offense. At first, the District Court, on the basis of the state court record, denied relief, but the court of appeals summarily reversed and directed the District Court to conduct an evidentiary hearing on the subject. At this subsequent hearing that court found that the respondent "was not advised by counsel or the court, at any time, that an intent to cause death or a design to effect the death of the victim was an essential element

of Murder 2nd Degree." In affirming the granting of the writ, the Supreme Court of the United States held, as stated in par. 3 of the headnotes:

> "A criminal defendant's plea of guilty may be involuntary either because he does not understand the nature of the constitutional protections that he is waiving, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt; without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense."

A similar situation was presented to the Court of Appeals for Franklin County in State v. Hawk, 55 Ohio App. 2d 231, 9 Ohio Opns 3d 378, 380 N.E. 2d 736 (1977), wherein the majority held, per par. 1 of the syllabus:

> "The failure of a trial court to make an oral inquiry with regard to whether an accused entered a plea of guilty to the offense of murder 'with an understanding of the nature of the charge' is reversible error. (State v. Caudill, 48 Ohio St. 2d 342, followed.)"

In that case, as in the case at bar, the record established that the trial court did in fact advise the defendant that he was entering a plea "to the stipulated lesser included offense of murder". There, as here, it was "quite apparent that the trial court did not make inquiries to determine whether defendant entered his plea of guilty...'with understanding of the nature of the charge'". Op. cit., 55 Ohio App. 2d @ 234.

A dissent in State v. Hawk, supra, emphasized the holding in State v. Stewart, 51 Ohio St. 2d 86, 364 N.E. 2d 1163 (1977), wherein it was held that "although it can be argued that the trial

court should adhere scrupulously to the provisions of Crim R. 11(C)(2) (State v. Caudill (1976), 48 Ohio St. 2d 342), there must be some showing of prejudicial effect before a guilty plea may be vacated." Here, the state's brief has also called our attention to that case. That case, however, dealt with the trial court's failure to advise the defendant that under the charge to which he had tendered a plea of guilty he was not eligible for probation.

The basic case with regard to the care required to be exercised by a trial court in the acceptance of a plea of guilty or of no contest is State v. Caudill, 48 Ohio St. 2d 342, wherein the Supreme Court held in the syllabus:

> "1. In accepting a written plea of no contest to a felony charge, the trial court must adhere scrupulously to the provisions of Crim. R. 11(C)(2).
>
> "2. Adherence to the provisions of Crim. R. 11(C)(2) required an oral dialogue between the trial court and the defendant which enables the court to determine fully the defendant's understanding of the consequences of his plea of guilty or no contest.
>
> "3. The requirements of Crim. R. 11(C)(2) are not satisfied by a written statement by the defendant or by representations of counsel."

State v. Hawk, supra, (wherein a motion for leave to appeal was overruled, March 17, 1978) recognized that State v. Stewart, supra, modified the first, but not the second and third paragraphs of the syllabus of Caudill, but held that omissions of compliance with Crim. R. 11 with regard to defendant's understanding of the nature of the charge against him remains unmodified by Stewart, and further held that it would be improper for that court to extend Stewart as to further modify the syllabus of Caudill.

Subsequent to Hawk and Stewart, the Supreme Court further relaxed the requirements of Caudill in State v. Strawther, 56 Ohio St. 2d 298, 383 N.E. 2d 900 (1978), and in State v. Billups, 57 Ohio St. 2d 31, 385 N.E. 2d 1308 (1979). Strawther involved the failure of the trial court orally to advise the defendant that he had a right to compulsory process to obtain witnesses in his behalf, and the Supreme Court held that in the absence of prejudicial effect such omission does not constitute prejudicial error. In Billups the trial court omitted some of the required colloquy because the defendant acknowledged that he had heard and understood the court's earlier colloquy with a previous defendant, which procedure was held to be a substantial compliance with the Rule. Billups did specifically point out that the trial court did conduct a discussion with the defendant apprising him of the nature of the charges.

From our examination of the record we conclude that in the case before us prior to the court accepting Defendant's no contest plea the court did not engage in any dialogue with the Defendant "determining that he is making the plea voluntarily, with understanding of the nature of the charge." We hold that advising a defendant of the name of the charge set forth in the indictment is not tantamount to explaining to him the nature of the charge. In accordance with the holding in Henderson v. Morgan, supra, we conclude that unless the record establishes that a pleading defendant understood the nature of the charge against him, he cannot be said to have pleaded guilty or no contest to that charge voluntarily. We further reject the prosecution's argument

that the Stewart, Strawther, and Billups limitations on the Caudill rule can be extended to determination that there is substantial compliance with Crim. R. 11(C)(2) where the record fails to establish that the defendant understood the "nature of the charge" against him. The first part of Defendant's first assignment of error is accordingly held to be well taken.

The second part of Defendant's first assignment of error asserts that the trial court erred in accepting his no contest plea for the reason that he did not understand that he was not eligible for probation. In order to so advise a defendant at a plea, the trial judge would have to have a presentence report before him. In the case sub-judice there was no need for a presentence report prior to the finding of guilty. Under these circumstances the trial court is not required to inform a defendant that he is not eligible for probation prior to a plea. State v. Woods, 48 Ohio App. 2d 339, 357 N.E. 2d 1106 (1976). This part of Defendant's first assignment of error is not well taken.

In his second assignment of error, Defendant asserts that the trial court erred in failing to grant him probation and shock probation solely by reason of its determination that he was a "repeat offender" without granting him a meaningful hearing to rebut such determination. It is noted that under Crim. R. 11(B)(3) when a plea of no contest is accepted, unless the charge is one of aggravated murder, the court shall proceed with the sentencing under Rule 32. Under Crim. R. 32.2 a presentence report is required only before the court grants probation. Since the trial court had no legal obligation to require a presentence report

before sentencing Defendant, there can be no requirement that a defendant be permitted to offer testimony to rebut anything that might be contained in any presentence report which the court might examine prior to sentencing.

Defendant's third assignment of error raises the same question with regard to his motion for shock probation. In this situation he sought a formal hearing regarding that motion "for the purpose of submitting relevant and material evidence to rebut any previous determination by the Court that the Defendant is a repeat offender..." He does admit, however, that there is no clear statutory expression in Section 2947.061, Revised Code, conferring upon him the right to a hearing on his motion for shock probation. State v. Poffenbaugh, 14 Ohio App. 2d 59 (1968). In view of the state of the record here we need not comment on the due process argument Defendant advances. The trial court did not state that he sentenced Defendant to confinement solely because he found him to be a repeat offender. The sentence in our case had been announced and the prosecutor had called up the next case before the judge added, almost as an afterthought, that he found the Defendant to be a repeat offender. Defendant's second and third assignments of error are therefore overruled.

Since we have sustained Defendant's first assignment of error and have determined that, since the record did not establish that the Defendant knew the nature of the offenses with which he was charged, his plea of no contest cannot be considered to have been voluntarily given, this case will be reversed and remanded to the

common pleas court for further proceedings in accordance with law in order to afford the Defendant an opportunity to reconsider his plea.

.....

SHERER and CRAMER, JJ., concur.

(Judge Paul Sherer, Retired from the Court of Appeals, Second Appellate District, Judge Fred B. Cramer, Retired from the Butler County Common Pleas Court and Judge Donald L. Ziegel, Retired from the Preble County Common Pleas Court, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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APPENDIX A

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IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

| | | |
|---|---|---|
| STATE OF OHIO, | : | APPEAL NO. C-830848<br>TRIAL NO. B-832567 |
| Plaintiff-Appellee, | : | |
| vs. | : | O P I N I O N. |
| ANTHONY J. MISCH, | : | |
| Defendant-Appellant. | : | |

FILED
COURT OF APPEALS
JUN 27 1984
CLERK OF COURTS

Criminal Appeal from Court of Common Pleas

Judgment appealed from is: Reversed and Remanded

Date of Judgment entry on Appeal: June 27, 1984

Messrs. Arthur M. Ney, Jr., and Christian J. Schaefer, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Dennis E. Halaby, 615 Main Street, Second Floor, Cincinnati, Ohio 45202, for Defendant-Appellant.

BLACK, J.

Defendant pleaded guilty to theft and was sentenced to one year in the Ohio Penitentiary after a pre-sentence investigation. Defendant presents two assignments of error: (1) that the trial court erred in accepting his guilty plea, because the court failed to comply with Crim. R. 11(C)(2); and (2) that defendant was promised a split sentence which he did not receive. We sustain defendant's first assignment of error and overrule his second.

In his first assignment of error defendant contends that the trial court failed to inform him of the following: what was the effect of his guilty plea, that the trial court upon acceptance of his plea could proceed with judgment and sentence, and that he could not be compelled to testify against himself. Crim. R. 11(C)(2) requires that defendant be informed of each of these before his guilty plea may be accepted.[1]

The Ohio Supreme Court set forth in *State v. Ballard* (1981), 66 Ohio St. 2d 473, 423 N.E.2d 115, two tests to be used to determine whether the trial court complied with Crim. R. 11(C)(2). One test is to be used with the four constitutional rights enumerated in Crim. R. 11(C)(2)(c),[2] and the other test is to be used with all the other elements of Crim. R. 11(C)(2). When dealing with the nonconstitutional elements of Crim. R. 11(C)(2), the trial court need only "substantially comply" with the rule and defendant must show that any error was prejudicial. *Ballard*,

*supra* at 475, 423 N.E.2d at 117, *citing, State v. Stewart* (1977), 51 Ohio St. 2d 86, 364 N.E.2d 1163. A stricter standard is mandated for the four constitutional rights listed in Crim. R. 11(C)(2)(c), and this requires the court to inform defendant with greater care and completeness that he is waiving these rights, although the exact language of Crim. R. 11(C) need not be used. *Ballard, supra* at 477-78, 423 N.E.2d at 118-19.

The failure to inform defendant about the effect of his guilty plea, or about proceeding immediately to judgment and sentence, involves nonconstitutional rights. The less strict, substantial compliance/prejudice test must be applied to determine whether the court complied with Crim. R. 11(C)(2). A complete reading of the record indicates that defendant did understand the effect of his guilty plea. Defendant realized that his plea was an admission of guilt, because he was informed that his plea relieved the state from proving him guilty. Defendant admitted to the trial court that he must have been crazy to steal the stuffed animal. Defendant was sufficiently informed of the effect of his plea and the record does not demonstrate that he was prejudiced. Defendant is correct that the trial court did not specifically inform him that the court could proceed immediately to judgment and sentence, but defendant was not prejudiced, because the court did not immediately proceed to judgment and sentence. It ordered a pre-sentence investigation. *State v. Thomas* (May 14, 1980), Hamilton App. No. C-789456, unreported;

*State v. Brown* (Nov. 1, 1978), Hamilton App. Nos. C-780055, C-780056, unreported.

Defendant's complaint that the trial court did not inform him of his privilege against self-incrimination involves a constitutional right requiring the stricter standard set forth in *Ballard*. The Supreme Court stated in *Ballard, supra* at 480, 423 N.E.2d at 120, that defendant must be "meaningly informed" of his privilege against self-incrimination, and that the test is "whether the trial court explained or referred to the right in a manner reasonably intelligible to the defendant." In the instant case, the court completely failed to inform defendant of his privilege. The prosecution notes that defendant had signed a written plea that stated that he waived his constitutional right to a trial at which he could not be compelled to testify against himself. We hold that while this written waiver may satify the lesser substantial compliance/prejudice test, it does not meet the stricter test required for the four constitutional rights set apart in *Ballard*. Crim. R. 11(C)(2) requires that defendant be addressed personally and be informed of his right to "a trial at which he cannot be forced to testify against himself," and we interpret *Ballard* to require more than a written waiver of this privilege.[3]

In his second assignment of error defense counsel attaches a letter from defendant which alleges that defendant was promised a split sentence which he did not receive. As there is no evidence

on the record of the alleged plea bargain, defendant's second assignment of error is overruled. *Lamar v. Marburry* (1982), 69 Ohio St. 2d 274, 431 N.E.2d 1028.

Because defendant was not "meaningfully informed" of his privilege against self-incrimination, this case is reversed and remanded for further proceedings.

SHANNON, P. J., and PALMER, J., CONCUR.

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1. Crim. R. 11(C)(2) reads in part:

> (2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:
>
> * * *
>
> (b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.
>
> (c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself. (emphasis added)

2. These four constitutional rights are: the privilege against compulsory self-incrimination, the right to a jury trial, the right to confront accusors, and the right of compulsory process. The first three rights are referred to as "*Boykin* rights." *Boykin v. Alabama* (1969), 395 U.S. 238, 89 S. Ct. 1709, held that waiver of these rights cannot be presumed from a silent record.

3. The Ohio Supreme Court in *State v. Strawther* (1978), 56 Ohio St. 2d 298, 383 N.E.2d 900, held that a written guilty plea in which defendant waived his right to compulsory process was enought to show substantial compliance with Crim. R. 11(C)(2) when defendant could not demonstrate prejudice. *Strawther* was decided prior to *Ballard* and used the substantial compliance/prejudice test set forth in *Stewart, supra*. We believe that *Ballard, supra*, rejected this test for the four constitutional rights listed in Crim. R. 11(C)(2)(c), and that *Strawther* does not control what the trial court must do when it informs the defendant and determines that he understands that he is waiving the four constitutional rights.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.